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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 413

GEORGIA RAIL ROAD & BANKING COMPANY,
Appellant,

vs.

DOWNING MUSGROVE, WHO IS STATE REVENUE COMMISSIONER OF THE STATE OF GEORGIA,
Appellee

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA TO THE SUPREME COURT OF THE UNITED STATES

STATEMENT AS TO JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

Now comes Georgia Rail Road & Banking Company, appellant in the above stated case, and presents this Separate Statement, particularly disclosing the basis upon which appellant contends that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment of the Supreme Court of the State of Georgia.

1. The final judgment of the Supreme Court of the State of Georgia (referred to hereinafter as "the State Supreme Court"), which appellant desires the Supreme Court of the United States to review upon appeal and to reverse, has the effect of sustaining certain Georgia laws (hereinafter set forth) as valid in their application to appellant as against appellant's contention, timely and properly set up and asserted, that as applied to appellant they violate the contracts clause (Article I, Section 10, Paragraph 1) of the Constitution of the United States and do not exist so far as appellant is concerned. Hence, appellant contends that the Supreme Court of the United States has jurisdiction upon appeal to review said judgment of the State Supreme Court either (A) under Section 237 of the Judicial Code of the United States, as amended by the Act of February 13, 1925 (43 Stat. 936), 28 U. S. C. 344a (as in effect at and prior to the passage of the Act of January 31, 1928, 28 U. S. C. 861a, 861b, Chapter 14, 45 Stat. 54, or the amendatory Act of April 26, 1928, 28 U. S. C. 861b, Chapter 440, 45 Stat. 466), and pursuant to the provisions of the said two Acts of the year 1928; or (B) under Title 28, United States Code, Section 1257(2), and pursuant to 28 U. S. C. 861b,—depending on whether the jurisdiction of the Supreme Court of the United States to review upon appeal said judgment of the State Supreme Court, which became final prior to September 1, 1948, the effective date of the revised Title 28 of the United States Code, is still given by the legislation referred to in (A) or is now given by that referred to in (B). The statutory provisions referred to in (A) and (B) are set forth in Appendix I hereof.

2. The laws of the State of Georgia which said judgment of the State Supreme Court has the effect of sustaining as valid as against appellant's objections that as applied to it they are repugnant to the contracts clause (Article I, Section

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10, Paragraph 1) of the Constitution of the United States, are:

(a) The Act of the General Assembly of Georgia, approved February 28, 1874, entitled "An Act to amend the tax laws of this State, so far as the same relate to railroad companies, and to define the liability of such companies to taxation, and to repeal so much of the charters of such companies, respectively, as may conflict with the provisions of this Act." Said Act is printed in full in Georgia Laws 1874, pages 107 et seq., and a copy of same is hereto attached as Appendix II. Said Act, as amended in respects not here germane, has been codified as Sections 92-2602, 92-2603 and 92-2604 of the Code of Georgia of 1933 (the present official code of the State of Georgia). A copy of said code sections is hereto attached as Appendix III.

(b) Article I, Section III, Paragraph III of the Constitution of Georgia of 1945 which is: "All exemptions from taxation heretofore granted in corporate charters are declared to be henceforth null and void."

3. Said judgment of the State Supreme Court became final on the 28th day of July, 1948, it having been made and entered in the above entitled suit by the State Supreme Court under date of the 11th day of June, 1948, but was not handed down or published or otherwise made known by the State Supreme Court until the 15th day of June, 1948, with the consequence that the State Supreme Court caused the Commencement of the period of ten days during which a motion to rehear may be filed under its rules to be postponed until the 15th day of June, 1948, and on the 23rd day of June, 1948, appellant filed a motion to rehear, and on the 13th day of July, 1948, appellant filed a supplemental motion to rehear. The State Supreme Court entertained and considered said motion to rehear and said supplemental motion to rehear, but overruled both on the 16th day of July, without further opinion. Thereafter, on the 21st day of

July, 1948, appellant filed a second motion to rehear pursuant to leave to it so to do given by the State Supreme Court, and the State Supreme Court entertained and considered said second motion to rehear, but overruled it on the 28th day of July, without further opinion.

Appellant's application for appeal is presented on this the 13th day of October, 1948, and is timely filed, irrespective of whether the time within which it may be lawfully filed commenced to run from the day on which the State Supreme Court overruled the first motion to rehear and the supplemental motion to rehear which was July 16, 1948, or from the day on which the State Supreme Court overruled the second motion to rehear which was July 28, 1948, and irrespective of whether the time within which application for appeal may be made with respect to said final judgment of the State Supreme Court which became final prior to September 1, 1948, the effective date of the revised Title 28 of the United States Code, is still governed by Section 8 (a), Act of February 13, 1925, ch. 229, 43 Stat. 936, 940 (28 U. S. C. A. 350), Comp. St. § 1228b, and is three months, or is now governed by Title 28, United States Code, Section 2101(c) and is ninety days.

4. Said judgment of the State Supreme Court reversed the judgment of the trial court (Superior Court of Fulton County, Georgia) which had overruled a demurrer interposed to appellant's complaint as amended. Said demurrer contained grounds of general demurrer and grounds of special demurrer. Ground 3 of the general demurrer asserted that the suit although nominally against the Revenue Commissioner of Georgia was in reality a suit against the State of Georgia as to which the State had not consented to be sued. The State Supreme Court held that the suit is in purpose and effect a suit against the State as to which the State has not consented to be sued and not maintainable,

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and by its said judgment of reversal ordered and directed as follows: "Direction is given that the judgment overruling the demurrer on all grounds whether general or special, be vacated, and that ground 3 of the general demurrer be sustained and the petition dismissed, without any ruling or judgment as to other grounds and without prejudice to either party or the State with respect thereto."

Stated briefly, but sufficiently to show that the Supreme Court of the United States has jurisdiction upon appeal, appellant's complaint as amended (referred to hereinafter as "the complaint") which was challenged by said demurrer containing said Ground 3 alleged the following: That appellant was incorporated as "The Georgia Railroad Company" by an Act of the General Assembly of Georgia, assented to December 21, 1833 (Ga. L. 1833, pages 256 et seq.); that appellant's name was changed from "The Georgia Railroad Company" to its present name of "Georgia Rail Road & Banking Company" by an Act of the General Assembly of Georgia, assented to December 18, 1835 (Ga. L. 1835, page 180); that Section 15 of appellant's charter (said Act of December 21, 1833) provides: "• • • The stock of the said Company and its Branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said Railroads, or any one of them; and after that, shall be subject to a tax not exceeding one-half per cent per annum on the net proceeds of their investments"; that the Revenue Commissioner of Georgia had, in disregard of said charter tax limitation, commenced proceedings to enable him to assess, for *ad valorem* taxation for each of several specified back years, railroad lines of appellant (referred to in the complaint and hereinafter as "the Charter Tax Lines") to the same extent that he would have had the right to assess them had said charter tax limitation not existed; that said charter

tax limitation applied to the Charter Tax Lines and that they had already been taxed for each of said several back years to the full extent permitted by said charter tax limitation; that the said tax limitation contained in appellant's charter constituted a contract between appellant and the State of Georgia, and that the Commissioner, although attempting to proceed by virtue of one or the other or both of the Georgia laws set forth in numbered Paragraph 2 hereof, could not lawfully proceed by virtue of either, for the reason that both as applied to appellant's Charter Tax Lines are repugnant to the contracts clause (Article I, Section 10, Paragraph 1) of the Constitution of the United States and void, in view of appellant's charter tax limitation. (The complaint set up two judgments adjudicating that the Charter Tax Lines could not be taxed beyond what is permitted by the said charter tax limitation, and pleaded them as *res adjudicata,* one of said judgments having been rendered by a Georgia trial court and affirmed by the State Supreme Court (*The State of Georgia* v. *Georgia Railroad & Banking Company,* 54 Ga., 424) and the other having been rendered by a Circuit Court of the United States and affirmed by the Supreme Court of the United States in the case of *Wright, Comptroller-General of the State of Georgia* v. *Georgia Rail Road & Banking Company,* 216 U. S. 420.) The complaint sought a declaratory judgment adjudicating that appellant's Charter Tax Lines could not be taxed beyond what is permitted by said charter tax limitation and sought injunctions, temporary and permanent, and a restraining order to prevent assessment and taxation of the Charter Tax Lines beyond what is permitted by said charter tax provision. The complaint also prayed that the Court declare what remedy appellant should pursue in order to get an adjudication with respect to the taxability of its Charter Tax Lines, in the event the Court should deter-

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mine that it had pursued the wrong remedy. The complaint showed that the Georgia statutes as to remedy for judicial determination of *ad valorem* tax liability are confused and uncertain to the point that all of the remedies in such regard which once existed may now have been repealed by implication if not expressly—that certainly appellant could not take the risk of assuming the existence of one of these remedies in order to prevent the great harm that was about to be perpetrated upon it. (Paragraphs 22 and 23 of the complaint containing averments as to want of another remedy are set forth in Appendix IV hereto.)

The State Supreme Court said in its opinion the following:

> "We do not overlook the plaintiff's allegations to the effect that there are grave doubts and uncertainties as to what remedy it may pursue in contesting the effort of the defendant to assess its charter lines for ad valorem taxation. The petition referred to several statutes of this State relating to remedy, including injunction and affidavit of illegality, to wit: Ga. L., 1918, p. 232, Ga. L. Ex. Sess., 1937-38, p. 77; Ga. L. 1931, p. 200; Ga. L., 1943, p. 204, and prayed for a declaratory judgment as to remedy. The petition was not aided by such allegations and prayer with respect to remedies; for if, as we have held, the suit is in essence one against the State, no judgment should be rendered declaring what remedy or remedies would be available as against it, if any, as that would be a decision at least in part against the State, even though it has not consented to be sued, and is not even a party."

By adjudging that this suit against the State Revenue Commissioner, in which it is shown that there exists between appellant and the State of Georgia said charter contract as to taxability of appellant's Charter Tax Lines and that the Commissioner was undertaking to violate that contract, claiming to be acting under the Georgia statute and the pro-

vision of the State Constitution (which are both set forth in numbered Paragraph 2 hereof) which the complaint shows are void as applied to appellant by reason of repugnancy to the contracts provision (Article I, Section 10, Paragraph 1) of the Constitution of the United States in view of appellant's charter contract—by adjudging that such a suit as this is a suit against the State as to which the State has not consented to be sued and, therefore, cannot be maintained, when the complaint alleges and shows that appellant has no other remedy which can meet the test of adequacy, the State Supreme Court has in effect adjudicated that said Georgia statute and said provision of the State Constitution are valid as against appellant's claim that as applied to it they are void and do not exist for the reason that they violate the contracts provision of the Constitution of the United States in view of appellant's charter contract. And the Supreme Court of the United States has jurisdiction upon appeal. *General Oil Company* v. *Crain, Inspector of Coal Oil*, 209 U. S. 211; *People of State of New York* v. *Zimmerman*, 278 U. S. 63.

Had the State Supreme Court held that this suit would not lie, whether considered as one brought under the Georgia Declaratory Judgments Act (Ga. L. 1945, pages 137 *et seq.*) or as one seeking an injunction under general principles of equity, and had pointed out a remedy, then the decision would have been only that appellant had not presented its Federal questions by a remedy provided by the State, and such Federal questions could not be reached by the Supreme Court of the United States in this suit. *Copperweld Steel Co.* v. *Industrial Commission of Ohio*, 324 U. S. 780. But the State Supreme Court did not so hold. What it held was that this suit in which it was shown that appellant had no other remedy which could meet the test of adequacy was one against the State as to which the State had not con-

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sented to be sued and not maintainable, and by that erroneous holding gave effect to the validity of said Georgia laws (set forth in numbered Paragraph 2 hereof) against appellant's contention that as applied to it each and both are repugnant to the contracts clause (Article I, Section 10, Paragraph 1) of the Constitution of the United States and void in view of appellant's charter contract, with the result that the Supreme Court of the United States under the holding of *General Oil Co. v. Crain, supra,* has jurisdiction to review said final judgment upon appeal.

5. Representative of the many cases holding that such a suit as this is not a suit against the State is *Poindexter* v. *Greenhow, Treasurer,* 114 U. S. 270 (see statement top of page 296); and *Belknap* v. *Schild,* 161 U. S. 10. See *The Pullman Company* v. *Knott, as Comptroller of the State of Florida,* 243 U. S. 447.

6. The Georgia statute referred to in (a) of numbered Paragraph 2 hereof has already been held by the Supreme Court of the United States to be violative of the contracts clause (Article I, Section 10, Paragraph 1) of the Constitution of the United States and void as applied to appellant in view of its charter contract (*Wright, Comptroller-General of the State of Georgia* v. *Georgia Railroad & Banking Company,* 216 U. S. 420) and void for the same reason as applied to appellant's lessees (*Wright, Comptroller-General of the State of Georgia* v. *Louisville & Nashville R. R. Co., et al.,* 236 U. S. 687); and, as regards the provision of the State Constitution referred to in (b) of numbered Paragraph 2 hereof, the Supreme Court of the United States has held that a provision of the State Constitution, adopted subsequently to the passage of an act of the General Assembly of Georgia which chartered a railroad company and contained a tax limitation provision such as that contained in appellant's charter, can no more abrogate such charter

tax provision than can a statute passed by the Legislature. *Central of Georgia Ry. Co.* v. *Wright, Comptroller-General of the State of Georgia,* 248 U. S. 525.

7. Appellant considers itself under compulsion to seek review by the Supreme Court of the United States on appeal of said final judgment for the following reason: If appellant elected not to seek such review and suffered this suit to be dismissed pursuant to the direction to dismiss it contained in said final judgment of the State Supreme Court, appellant would quite naturally seek redress and protection of its rights under the Constitution of the United States, protection of which it seeks in this suit, by pursuing one of the three statutory remedies referred to in the complaint and shown therein to be uncertain even to the point of non-existence, and should the State Supreme Court hold that appellant had pursued a remedy which had been repealed or did not apply to its situation, appellant would try another of such remedies and if the State Supreme Court were to hold that that one no longer existed or did not apply to its situation, appellant would try the third, and if the State Supreme Court held that the third no longer existed or was inapplicable to its situation, appellant would be remitted to a suit in equity against the Revenue Commissioner of the State of Georgia as a wrongdoer to prevent him from taxing appellant beyond what is permitted by its charter contract. And there is danger that upon appellant's bringing such a suit in equity it would be met with a plea setting up as *res judicata* the judgment of the trial court dismissing this suit as one against the State entered pursuant to said final judgment of the State Supreme Court in this case, which would be urged on the contention that such a suit in equity was comprehended in, if not identical with, this suit and just as much a suit against the State as this suit which would have been held

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to be a suit against the State by the State Supreme Court by a judgment from which there had been no appeal to the Supreme of the United States, although such an appeal could have been taken by virtue of the holding in *General Oil Company* v. *Crain, Inspector of Coal Oil, supra,* 209 U. S. 211. Then if such a plea of *res judicata* were sustained by the State Supreme Court and appellant appealed to the Supreme Court of the United States. it might be met to its undoing by the case of *Angel* v. *Bullington,* 330 U. S. 183, on the thory that based on the *Crain* case (209 U. S. 211) appellant had a right of appeal to the Supreme Court of the United States from the final judgment of the State Supreme Court in this case and by not availing of that right of appeal cut itself off from the right ever to get the Supreme Court of the United States to reverse the State Supreme Court for denying appellant its constitutional rights by the device of holding that a suit against the Revenue Commissioner of the State of Georgia as a wrongdoer is a suit against the State of Georgia as to which the State has not consented to be sued and is not maintainable. The Georgia statutes as to remedy are in such a confused and uncertain state that appellant's apprehension above expressed is not fanciful but has real basis. Hence to avoid such an eventuality as that just pointed out, appellant insists on its right to appeal to the Supreme Court of the United States from said final judgment of the State Supreme Court.

8. Said judgment of which appellant seeks review in the Supreme Court of the United States upon appeal is final, the said State Supreme Court having left nothing to be done by the trial court except the ministerial act of dismissing the suit pursuant to the direction of the State Supreme Court. *Gospel Army* v. *City of Los Angeles,* 331 U. S. 543. The Supreme Court of the State of Georgia

is the highest Court of the State of Georgia in which a decision in this suit could be had.

9. The Federal question involved is substantial, being whether Georgia laws (the Georgia statute and the provision of the Georgia Constitution set forth in numbered Paragraph 2 hereof) purporting to authorize the State and certain of its political subdivisions to tax *ad valorem* appellant's Charter Tax Lines beyond what is permitted by the provision of Section 15 of its charter (which provision is quoted on Page 5 hereof) are as applied to appellant repugnant to the contracts provision (Article I, Section 10, Paragraph 1) of the Constitution of the United States and void.

There is also involved the substantial question of whether this is a suit against the Revenue Commissioner of Georgia as a wrongdoer or a suit against the State of Georgia itself.

10. Copy of the opinion and order of the trial court is attached hereto as Appendix V. The opinion of the State Supreme Court has not yet been officially reported, but has been published in 49 S. E. 2d 26, (Advance Sheets, No. 1, September 16, 1948.) A copy of said opinion of the State Supreme Court is attached hereto as Appendix VI. And a copy of said final judgment of the State Supreme Court entered pursuant to its said opinion, together with a copy of both of the State Supreme Court's said orders denying appellant's motions to rehear is attached hereto as Appendix VII.

This 13th day of October, 1948.

JAMES E. HARPER,
W. INMAN CURRY,
REMBERT MARSHALL,
Attorneys for Georgia Rail Road & Banking Company, Appellant.

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APPENDIX "I"

28 U. S. C. § 344. (Judicial Code, section 237.) Appellate jurisdiction of decrees of State courts; certiorari.

(a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon appeal. The appeal shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the appeal.

28. U. S. C. § 861a. Writ of error abolished; substitution of appeal.

The writ of error in cases, civil and criminal, is abolished. All relief which prior to January 31, 1928, could be obtained by writ of error shall hereafter be obtainable by appeal. (Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54.)

28 U. S. C. § 861b. Statutes governing writs of error to apply to appeals.

The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which section 861a of this title substitutes for a writ of error. (Jan. 31, 1928, ch. 14, § 2, 45 Stat. 54; Apr. 26, 1928, ch. 440, 45 Stat. 466.)

Title 28, United States Code, Section 1257. State courts; appeal; certiorari.

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * * * * * *

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

APPENDIX "II"

The Act of the General Assembly of Georgia, approved February 28, 1874, and published in Georgia Laws, 1874, pages 107 et seq. is as follows:

An Act to amend the tax laws of this State, so far as the same relate to railroad companies, and to define the liability of such companies to taxation, and to repeal so much of the charters of such companies, respectively, as may conflict with the provisions of this Act.

§ 26. Section I. *The General Assembly do enact,* That, from and after the passage of this Act, the presidents of all the railroad companies in this State shall be required to return, on oath, annually, to the Comptroller General, the value of the property of their respective companies, without deducting their indebtedness; each class or species of property to be separately named and valued, so far as the same may be practicable, to be taxed as other property of the people of the State, and that said returns shall be made under the same regulations provided by law for the returns of officers of other incorporated companies which are required by law to be made to the Comptroller General.

§ 27. Sec. II. *Be it further enacted,* That said presidents shall pay to the Comptroller General the taxes assessed upon the property of said railroad companies, and on failure to make the returns required by the preceding section, or on failure to pay the taxes so assessed, the Comptroller General shall proceed to enforce the collection of the same, in the manner provided by law for the enforcement of taxes against the other incorporated companies hereinbefore mentioned.

§ 28. Sec. III. *Be it further enacted,* That if any railroad company affected by the first and second sections of this

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Act desires to resist the collection of the tax herein provided for, said company, through its proper officer, may, after making the return required in the first section of this Act, and after paying the tax levied on such corporation by the tax act for 1873, and continuing to pay the same while the question of its liability under this Act is undetermined, resist the collection of the tax herein provided for by filing an affidavit of illegality to the execution or other process issued by the Comptroller General aforesaid, and stating fully and distinctly the grounds of resistance, which shall be returnable to the Superior Court of Fulton County, to be there determined as other illegalities, only the same shall have precedence of all cases in said Court, as to time of hearing, and with the same right of motions for new trial and writs of error as in other cases of illegality, on the part of the Comptroller General and of said corporation, in which cases the Comptroller General shall be represented by the Attorney General of the State, or such other attorney as the Governor may select, and if the grounds of such illegality be not sustained, the Comptroller General shall, after crediting the process aforesaid with amount paid, proceed to collect the residue due under the provisions of the Act, and if, at any time during the pendency of any litigation herein provided for, the said corporation shall fail to pay the tax required to be paid as a condition of hearing, then said illegality must be dismissed, and no second affidavit of illegality shall be allowed. Said illegality may be amended as other affidavits of illegality, and shall always be accompanied by good bond and security for the payment of the tax *fi. fa.* issued by the Comptroller General.

Sec. IV. Repeals conflicting laws.

Approved February 28, 1874.

(Copied from Ga. L. 1874, pages 107 and 108.)

APPENDIX "III"

Sections 92-2602, 92-2603 and 92-2604 of the Georgia Code of 1933 are as follows:

92-2602 (1032) Presidents to make returns.—The presidents of all the railroad companies, including street railroads, dummy railroads, and electric railroads in this State shall be required to return on oath, annually, to the Comptroller General, the value of the property of their respective companies, without deducting their indebtedness; each class or species of property to be separately named and valued, so far as the same may be practicable, to be taxed as other property of the people of the State; and said returns shall be made under the same regulations provided by law for the returns of officers of other incorporated companies, which are required by law to be made to the Comptroller General: Provided, that the said railroads shall be taxable for city purposes as other property is taxed for city purposes, and any law making railroad companies taxable by counties will be applicable to street railroad companies of every character. (Acts 1874, p. 107; 1889, p. 36.)

92-2602. (1033) Presidents to pay taxes assessed.—Said presidents shall pay to the Comptroller General the taxes assessed upon the property of said railroad companies; and on failure to make the returns required by the preceding section, or on failure to pay the taxes so assessed, the Comptroller General shall proceed to enforec the collection of the same in the manner provided by law for the enforcement of taxes against other incorporated companies. (Acts 1874, p. 107.)

92-2604. (1034) Illegality to resist tax; venue.—If any railroad company affected by the preceding sections desires to resist the collection of the tax therein provided for, said company through its proper officer may, after making the return required in section 92-2602, and after paying the tax levied on such corporation and continuing to pay the same while the question of its liability herein is undetermined, resist the collection of the tax above provided for, by filing an affidavit of illegality to the execution or other process issued by the Comptroller General, stating fully and dis-

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tinctly the grounds of resistance, which shall be returnable to the superior court of Fulton County, to be there determined as other illegalities; the same to have precedence of all cases in said court as to time of hearing, and with the same right of motions for new trial and writs of error as in other cases of illegality, in which case the Comptroller General shall be represented by the Attorney General of the State. If the grounds of such illegality are not sustained, the Comptroller General shall, after crediting the process aforesaid with the amount paid, proceed to collect the residue due under the provisions aforesaid; and if, at any time during the pendency of any litigation herein provided for, the said corporation shall fail to pay the tax required to be paid as a condition of hearing, said illegality shall be dismissed, and no second affidavit of illegality shall be allowed. Said illegality may be amended as other affidavits of illegality, and shall always be accompanied by good bond and security for the payment of the tax execution issued by the Comptroller General. (Acts 1874, p. 107; 1931, pp. 7, 38.)

(Copied from Code of Georgia of 1933.)

APPENDIX "IV"

Paragraphs 22 and 23 of the complaint are as follows:

22. Petitioner desires to contest the effort of the Defendant to assess said property for taxation as hereinbefore set out, but is advised by Counsel and, therefore, alleges that there are grave doubts and uncertainties as to the method to be followed in so doing for the following reasons:

(a) Petitioner is advised that Defendant is proceeding under the Act of 1918, page 232 (Chapter 92-61 of the Code of 1933) which provides for assessments against property owners failing to return or grossly under-valuing their property, and which provides, in Section 92-6104, that a taxpayer who disputes the taxability of this property may raise the question by petition in equity in the Superior

Court of Fulton County. Chapter 92-61 of the Code of 1933 may not be applicable in this case because:

(1) Petitioner has not omitted to return its property for taxation for the years 1939-1945 inclusive, and has not under-valued the property which it has returned for those years, and because.

(2) The Act of 1918, page 232 or, at least, Section 92-6104 in the Code of 1933, may have been repealed by the Act of 1937-38 Ex. Sess. page 77, providing in Section 44 for review by the Board of Tax Appeals of assessments made by the State Revenue Commission and said provisions of said Act of 1937-38 may, in turn, have been repealed, as to questions involving taxabilty, by the provisions of the act of 1941, page 200 (Code of 1933, Section 92-8426-a) withdrawing from the Board of Tax Appeals the right to review assessments entered by the State Revenue Commissioner except those entered by the Commissioner on tax returns for ad valorem taxation required to be made to him.

(b) Both the Act of 1918, page 232 (Code of 1933, Chapter 92-61) and the applicable provisions of the Act of 1937-38, Ex. Sess. page 77 (if the same have not been repealed by the Act of 1941, page 200, Code Section 92-8426-a) may have been repealed by the Act of 1943 page 204 (Code of 1933, Section 92-8426-d to 92-8426-f) which provides, by reference to Section 92-8446 of the Code of 1933, for a review of assessments made by the State Revenue Commissioner by appeal to the Superior Court of the County in which is located the taxpayer's principle place of doing business or in which the taxpayer's chief or highest corporate officer resident in this State maintains his offices which, in Petitioner's case, would be the Superior Court of Richmond County, Georgia.

(c) The Act of 1943, page 204 (Code of 1933, Section 92-8426-d) provides that nothing therein contained "shall be construed to deprive a taxpayer against whom an execution for taxes has been issued under an assessment by the State Revenue Commissioner of the right to resist enforcement of the same by affidavit of illegality." The Act of 1931, page 7 (Code of 1933, Section 92-7301) gave to a tax-

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payer the right to test the question whether a tax assessed by the State Revenue Commissioner was legally due by affidavit of illegality, but Petitioner is advised that doubt exists as to whether that Act was repealed by the Act of 1937-38, Ex. Sess., page 77 and, therefore, as to whether Petitioner would have the right to test the question whether this tax is legally due by affidavit of illegality. If said Act of 1931 has been repealed, then there is doubt as to whether Petitioner has the right to test by affidavit of illegality the question whether the taxes involved in this case are legally due, because the only other right given to a taxpayer who makes returns to the State Revenue Commissioner to file an affidavit of illegality is to be found in Code Section 92-2604, and it has been held by the Supreme Court of Georgia, that that remedy is only open to taxpayers who have made their returns. While Petitioner contends that it has made returns of all its property subject to ad valorem taxation, Defendant contends that it has not.

23. Petitioner shows that for the reasons set forth in the foregoing paragraph, Petitioner's remedy to contest its liability for the assessments which Defendant proposes to make, by or through any statutory proceedings or proceedings at law, is highly doubtful and uncertain, and Petitioner can not safely risk an adjudication as to the proper remedy by following either the procedure outlined in Section 92-6104 of the Code of 1933 or the procedure outlined by the Act of 1938, as it has been amended for the reason that, once the assessment is made, the taxpayer must present the appeal under the Act of 1938, as amended, within thirty days, if that be the remedy. Thus if Petitioner seeks to contest the taxability of said property by a petition in equity, as authorized by Section 92-6104 of the Code of 1933, and it should be determined that that section and the procedure there authorized has been repealed or superseded by the Act of 1938, it would then be too late to appeal from the assessment. On the other hand, if Petitioner should appeal from the assessment within thirty days, and it should thereafter be determined that Petitioner's remedy was by following the procedure outlined in Section 92-6104 of the Code of 1933, with the result that Petitioner's appeal would

be dismissed, Petitioner would then be in danger of its *petition in equity being barred on account of laches. If* Petitioner should thus be placed in a position in which neither the procedure outlined in Code Section 92-6104 nor that outlined in Sections 8426-d and 92-8446 was open to it, it is doubtful, for the reasons hereinbefore stated, whether Petitioner could proceed by affidavit of illegality, so that Petitioner might be remediless.

APPENDIX "V"

OPINION AND ORDER OF TRIAL JUDGE

Number 154498

Fulton Superior Court

GEORGIA RAILROAD & BANKING COMPANY

v.

GLENN S. PHILLIPS, State Revenue Commissioner

ORDER ON DEMURRERS AND MOTION OF DEFENDANT

The case is before the Court on the original and renewed demurrers of the defendant to the plaintiff's petition as amended, and there is also a motion before the Court to dissolve the restraining order previously granted upon stated grounds.

1. On the demurrers to the petition as amended. The petition in this case and the questions raised by the demurrers are in many respects and substantially the same questions that were raised in *Southwestern Railroad Company v. Thompson,* State Revenue Commissioner, Number 154499 of this court, in which this Court on March 18, 1946, overruled all the general and special demurrers. A majority of the demurrers in this case are similar and identical to the questions raised in the Southwestern case, and the reasons given in that case require a similar ruling in this

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case. However, some additional questions are raised by the demurrers. One question is whether or not the branch line known as the Warrenton branch is subject to exemption as a charter tax line, and, second, it is contended that the extension of the Georgia Railroad from Madison to Atlanta does not come within the claimed tax exemption provision of the original charter of the railroad. Though the four mile branch of the Georgia Railroad from Camak to Warrenton may not have been mentioned by name in the many cases litigated in the State and Federal courts in regard to whether the property of the Georgia Railroad was free from ad valorem taxation, yet apparently no question was ever raised in any of these cases that this branch was not a part of the Georgia Railroad which was constructed by virtue of the original charter granted to the railroad by the State, and no effort has been made on the part of the taxing authorities of the State to assess or collect taxes against this branch. It appears from the Acts of the General Assembly that the authority to construct this branch was authorized by the General Assembly in the form of an amendment to the charter of the Georgia Railroad & Banking Company. There is nothing in the original charter or the amendment thereto that would forbid the corporation from treating this Warrenton branch as a part of its railroad system, and it appears to have been the purpose of the State in limiting the rate or method of taxation of the property to exempt all of the railroad property that was constructed by virtue of its charter and amendments thereto.

As to the line running from Madison to Atlanta, that part of the line was expressly held to be part of the charter tax line in the case of *Georgia Railroad and Banking Company v. Wright, Comptroller General*, 132 Fed. 912, affirmed 216 U. S. 420, (which judgment is plead as being *res adjudicata* in this case). Judge Newman in his decree in that case expressly held "that the charter (exemption) covers complainant's main railroad between the cities of Augusta and Atlanta."

Wherefore, it is considered, ordered and adjudged that the general and special demurrers, original and as made

and renewed after the filing of amendments by the plaintiff, be and are hereby overruled on each and every ground.

2. On the motion of defendant to dissolve the restraining order as heretofore granted for several reasons set out in this motion, the Court is of opinion that only one of the grounds therein requires any explanation for the order that is to be entered on this motion, and that is the ground that "a declaratory judgment is not the proper remedy in this case."

The Court is of the opinion that even if this petition be construed as a petition seeking solely a declaration of rights, it could be sustained under the provisions of the Declaratory Judgment Law of 1945, but is also of the opinion that it is not only an action which seeks a declaration of rights but is also one seeking relief in equity which can be granted regardless of the sufficiency of the petition as being one under the Declaratory Judgment Law.

In its essence the petition is one brought under the old and well known remedy in equity and known as a bill of peace, and the facts in this petition fall clearly within the purview of Code Section 37-1501 which provides:

"It being the interest of this State that there shall be an end of litigation, equity will entertain a bill of peace:

"1. To confirm some right which has been previously satisfactorily established by more than one legal trial, and is likely to be again litigated."

"2. To avoid a multiplicity of suits by establishing a right, in favor of or against several persons, which is likely to be the subject of legal controversy, or in other similar cases."

One of the definitive purposes of a bill of peace is to establish and perpetuate the rights which a person claims and where several unsuccessful attempts have been made to overthrow them, and justice and right require that the person be perpetually enjoined from asserting them. *Ritchie v. Dorland*, 6 Calif. 33. Where a party has successfully maintained a position in more than one litigation

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over the same subject matter and he is threatened with further litigation about the same matter, he may resort to equity to enjoin further litigation, though he would have a right to plead abatement or in bar the previous judgment. See *Foltz v. St. Louis etc. Railroad Company*, 60 Fed. 316; *Laursen v. Lowe*, 197 N. E. 597 (Ohio); *Field v. Early*, 45 N. E. 197 (Mass.); *Primm v. Raboteau*, 56 Mo. 407.

The case of *McIntyre v. Harrison, Comptroller General*, 172 Ga. 65, supports the view that we take. There a number of plaintiffs sought to enjoin the Comptroller General from attempting to collect taxes under a statute which the plaintiffs claimed did not impose a tax, and the equitable ground upon which plaintiffs brought suit for injunction was to avoid multiplicity of actions. In holding that the action was not subject to demurrers of the defendant, the court held that (a) an injunction will lie to enjoin the collection of tax under a statute which does not authorize its imposition when the proceeding is brought by a number of persons against whom it is sought to enforce the tax upon the equitable principle of avoidance of multiplicity of actions, and (b) that injunction was the proper remedy to resist the enforcement by the Comptroller General of such tax.

It is generally recognized that a plaintiff may ask for a declaration of rights and at the same time seek independent equitable relief. See *Rennick v. Hay*, 106 Atl. 547 (N. J.); *Reese v. Levin*, 123 So. 809 (Fla.); *Brix v. Peoples Mutual Life Insurance Company*, 37 Pac. (2) 448 (Calif.); and *Holly etc. Corporation v. Fritzler*, 296 Pac. 206 (Wyo.). In the last cited case the court in dealing with this question said:

"Under section 1 of our Declaratory Judgments Act, rights and other legal relations may be declared 'whether or not further relief is or could be claimed.' The statute accordingly seems to contemplate that relief for declaration of rights may be considered as additional relief which courts have not ordinarily heretofore granted, and which may be granted in any action whether at law or in equity. That view is clearly borne out by the authorities heretofore cited. Plaintiff by praying for a declaration of rights merely substituted that relief for the relief ordinarily prayed in an

action in equity. He did not, we think, thereby abandon his claim that the action was one in equity, in so far as the allegations in the petition justified its consideration as such. And in fact plaintiff prayed for equitable relief in addition to the relief for declaration of rights by the very fact that he prayed relief against all the defendants. If this view is correct, and we think it is, then we need but to consider whether, though a separate contract with each of the several defendants is involved, the case is nevertheless one of those coming within the jurisdiction of a court of equity."

The Court is, therefore, of the opinion, even if the case be construed as not being sufficient under the Declaratory Judgment Act, it does set forth a cause of action as a bill of peace.

All grounds and prayers of said motion to dissolve the restraining order heretofore granted are overruled and denied, and said prior restraining order as granted against M. E. Thompson, State Revenue Commissioner, is continued as of force until further order of the court against Glenn S. Phillips, State Revenue Commissioner.

This 16th day of December, 1947.

(S.) Bond Almand,
Judge, Superior Court, Atlanta Circuit.

APPENDIX "VI"

SUPREME COURT OF GEORGIA

Decided June 11, 1948.

No. 16178

Musgrove

v.

Georgia Railroad & Banking Company

By the Court:

The charter of the plaintiff railroad company granted in 1833 (Ga. L. 1833, p. 256) provided: "The stock of the

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said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said rail roads or any one of them: and after that, shall be subject to a tax not exceeding one half per cent per annum on the net proceeds of their investments."

In the instant suit, brought by the company against the State Revenue Commissioner, it sought among other things to obtain a declaratory judgment decreeing that such charter provision constitutes a contract between the plaintiff and the State of Georgia, valid and binding upon the State and its officers in perpetuity, and prayed also for perpetual injunction to restrain the defendant and his successors in office from assessing certain of its railroad properties described as "charter tax lines" from ad valorem taxation. *Held:*

Whether the petition be construed as one brought against the defendant in his official capacity or in his individual capacity, it was in substance and effect an action against the State and was not maintainable, the State not having consented to be thus sued. The court therefore erred in overruling the third ground of general demurrer presenting this contention. Other grounds of demurrer, whether general or special, should not have been passed upon, and direction is given that ground 3 of the general demurrer be sustained and that the petition be thereupon dismissed, without any ruling or judgment as to other grounds, and without prejudice to either party or the State with respect thereto.

On October 15, 1945, Georgia Rail Road & Banking Company filed a petition in the superior court of Fulton County "against M. E. Thompson, in his representative capacity as State Revenue Commissioner of the State of Georgia," seeking a declaratory judgment and injunction, the object of the suit being in part to prevent the defendant from assessing for ad valorem taxation two lines of railroad owned by petitioner, one extending from Augusta to Atlanta, and one from Union Point to Athens, Georgia; it being alleged and contended that, under its charter and also under previous adjudications, these railroad properties are exempt from ad valorem taxation. The petition was sanc-

tioned and ordered filed, and a restraining order was issued.

On December 5, 1945, the defendant as thus sued filed a general and special demurrer to the petition.

The plaintiff offered two amendments, both of which were allowed on December 16, 1946, subject to demurrer or other objection. One, designated as "Amendment No. 1 of Dec. 16th, 1946", prayed that the petition be amended by striking from the first and numbered paragraph the allegation that said petition is "against M. E. Thompson, in his representative capacity as State Revenue Commissioner of the State of Georgia," and by inserting in lieu thereof the allegation that said petition is "against M. E. Thompson, who is State Revenue Commissioner of the State of Georgia." No objection was ever made to the allowance of this amendment. The other amendment, designated as "Amendment No. 2, of Dec. 16, 1946," sought to add a third line of railroad, extending from Camak to Warrenton, Georgia, as to which third line it was alleged that plaintiff is entitled to the same relief as prayed with respect to the other two lines. In his order allowing this amendment subject to demurrer or objection, the judge enlarged his former restraining order so that it would include such third line, as prayed.

On November 24, 1947, on a "plea for substitution of party" filed by Glenn S. Phillips, who succeeded Thompson as State Revenue Commissioner, the judge entered an order, substituting Glenn S. Phillips as a party defendant in the case and ordering that the cause proceed "against the said Glenn S. Phillips in the same manner and with the same consequences as if he had been the original defendant therein." Such "plea for substitution of party" alleged the appointment of Glenn S. Phillips as State Revenue Commissioner, and his adoption of the pleadings of the original defendant in said case.

On the same date, November 24, 1947, the defendant Phillips filed objections to allowance of the amendment of December 16, 1946, adding the third line of railroad, and to the inclusion of this line within the former restraining order. Also on the same date, the defendant "after all the amendments filed by the plaintiff have been allowed, subject to the objections to said amendments . . . adopts and renews its demurrers previously filed, both general and

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special, on each and every ground therein set out to the original petition, and also to the petition as amended, and says that said petition as amended should be dismissed for each and every reason set out in the original demurrers." Other grounds of demurrer, both general and special, were then stated.

On the same date the judge entered an opinion and judgment (1) overruling "the general and special demurrers, original and as made and renewed after the filling of amendments by the plaintiff . . . on each and every ground," and (2) refusing "to dissolve the restraining order heretofore granted." It was stated in the order that "Even if the case be construed as not being sufficient under the declaratory judgment act, it does set forth a cause of action as a bill of peace." The defendant excepted.

In ground 3 of the general demurrer, it was expressly urged that the suit "is in reality an action against the State, and the State has not consented to be made a party to this action or for the action to proceed against it." The same contention is expressly urged in this court by Phillips as plaintiff in error.

The petition as amended contained substantially the following allegations:

3. The defendant, as State Revenue Commissioner, is empowered by statute to assess railroad property for taxation by the State and its political subdivisions and to issue executions therefor, but is exceeding the authority given to him by the statutes of the State of Georgia and is acting unlawfully and in violation of the constitution of the State of Georgia and of the United States, for tthe reasons hereinafter set out.

4. On August 28, 1945, the defendant wrote the following letter jointly to petitioner and to C. H. Phinizy, its president:

"Dear Sirs: The Georgia Railroad & Banking Company having failed to file full and complete tax returns with the State Revenue Commission of the State of Georgia for the years 1939 through 1945, inclusive, you are hereby notified of such delinquency and are demand to make full and com-

plete tax returns to the State Revenue Commissioner within twenty days, as provided by law, covering all taxable property of said Georgia Railroad & Banking Company, for State, County, Municipal and school taxes. Yours very truly, Department of Revenue, M. E. Thompson, Commissioner. Blanks will be furnished upon request."

5. Petitioner denies that, for the years 1939 through 1945 inclusive, or for any one of those years, it failed to file full and complete tax returns, but alleges that it has filed such returns and paid all taxes for which it was lawfully liable. Petitioner has therefore declined to make any returns to the State Revenue Commissioner in addition to the returns already made.

6. Nevertheless defendant has threatened to and will, unless restrained by this court, assess against petitioner ad valorem taxes with respect to certain of its lines of railroad and their appurtenances, namely, the main line from Augusta to Atlanta; the Athens Branch, from Union Point to Athens (the approximate length of each being stated); both of which lines were constructed under and by virtue of the Act of the General Assembly of Georgia approved December 21, 1833, hereinafter referred to; and the branch from Camak to Warrenton, a distance of four miles, which was constructed under and by virtue of the Act of the General Assembly of Georgia assented to December 22, 1835, which amended the charter of petitioner so as to authorize the construction of such branch line; said three lines of railroad being hereafter referred to as the "charter tax lines,"

7. Petitioner's charter tax lines are not subject to ad valorem taxation, as will more fully hereinafter appear.

8. Petitioner is a railroad corporation chartered as "Georgia Rail Road Company" by the State of Georgia by special act of the General Assembly approved December 21, 1833, the name of said company having been changed to "Georgia Rail Road & Banking Company" by a special act of the General Assembly approved December 18, 1835.

9. By section 15 of said act approved December 21, 1833, which is now and at all times since its approval has been a

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part of petitioner's charter, it is enacted as follows: "The stock of the said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said rail roads or any one of them: and after that, shall be subject to a tax not exceeding one half per cent. per annum on the net proceeds of their investments."

10. The provision of petitioner's charter as above quoted is applicable to petitioner's said charter tax lines, all of which were completed many years prior to 1939.

11. In addition to its charter tax lines petitioner owns other lines of railroad, herein referred to as its "general tax lines," to which the quoted provisions of its charter are not applicable.

12. Petitioner has always paid taxes on the general tax lines on the ad valorem basis. The assessment in question in this case is with respect to the charter tax lines of petitioner. Petitioner has never paid ad valorem taxes with respect to the charter tax lines, but these lines have always been taxed on their net income under the provisions of petitioner's charter quoted in paragraph 9 hereof. Petitioner has regularly each year made tax returns as required by law of the charter tax lines on the basis of the net income, and said returns have been accepted by the State tax authorities, and said returns having been accepted by the State and the tax paid thereon, they cannot now be opened.

The net income payable under the charter is not the rental received by petitioner from its lessees, but is the net income from the operation of the charter tax lines. The net income of the charter tax lines has always been computed in this way. The taxes now payable on one-half of 1% of net income are very much less than the taxes payable on the ad valorem basis at the prevailing tax rates.

13. On May 7, 1881, petitioner, in the exercise of the power conferred upon it by its said charter, leased its railroad properties to William M. Wadley for the term of

99 years from April 1, 1881, and Louisville and Nashville Railroad Company and Atlantic Coast Line Railroad Company are Wadley's successors in interest to said lease.

14. The defendant claims that in assessing the taxes here complained of he is proceeding under the act of the General Assembly of Georgia approved February 28, 1874 (Ga. L. 1874, p. 107), entitled "An Act to amend the tax laws of this State, so far as the same relate to railroad companies, and to define the liability of such companies to taxation, and to repeal the charters of such companies, respectively, as may conflict with the provisions of this Act" (Code, §§ 92-2602, 92-2603, 92-2604), and under Article 1, section 3, paragraph 3 of the constitution "as amended August 7, 1945" which reads: "All exemptions from taxation heretofore granted in corporate charters are declared to be henceforth null and void;" although the constitution of 1877 provided "No . . . law impairing the obligation of contracts . . . shall be passed," and this provision was retained "in the constitution as amended August 7, 1945."

15. That part of section 15 of petitioner's charter quoted in paragraph 9 hereof, is an irrevocable and inviolable contract between the State of Georgia and petitioner, and cannot be modified or changed by any subsequent legislative act of the State or by any subsequent provision in the State constitution. The said act of 1874, and article 1, section 3, paragraph 3 of the constitution, referred to in paragraph 14 hereof, are unconstitutional and void in that they are contrary to article 1, section 10, paragraph 1 of the constitution of the United States, which provides that "No State . . . shall pass any . . . law impairing the obligation of contracts," in that said act of 1874 and said provision of the constitution of Georgia (1945) undertake to subject the charter lines of petitioner to ad valorem taxation in violation of the aforesaid provision of section 15 of petitioner's charter. For the same reason, said act of 1874 is unconstitutional and void, because it violates the above stated provision of the constitution of Georgia of 1877, as amended August 7, 1945, declaring that "No . . . law impairing the obligation of contracts . . . shall be passed."

For these reasons the assessment which the defendant has

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threatened to make and which, unless restrained, he will make against petitioner for ad valorem taxes on petitioner's charter tax lines for the years 1939-45, inclusive, are not authorized by law or by the constitution, and the acts and things threatened by the defendant are illegal and in violation of the rights of petitioner.

16. If defendant is proceeding under any other act of the General Assembly, or under any provision of any constitution of the State of Georgia, passed or adopted subsequent to December 21, 1833, any such other act or constitutional provision is null and void because in violation of article 1, section 3, paragraph 2 of the constitution of Georgia (contract clause), in that it seeks to subject the charter tax lines of petitioner to ad valorem taxation in violation of the aforesaid provision of section 15 of petitioner's charter.

17. "Article 1, section 3, paragraph 3 of the constitution of Georgia of 1877, as amended August 7, 1945," which provides, "All exemptions from taxation heretofore granted in corporate charters are declared to be henceforth null and void," is itself unconstitutional and void when applied to the taxation of the charter tax lines of petitioner on an ad valorem basis, because the same is contrary to article 1, section 10, paragraph 1 of the United States constitution, which provides that "No State shall . . . pass any . . . law impairing the obligation of contracts," because it seeks to subject the charter tax lines of petitioner to ad valorem taxation in violation of section 15 of petitioner's charter. In other words, the State of Georgia cannot avoid the constitution of the United States by repealing its own contracts or by declaring its own contracts void.

18. The said provision in the constitution of Georgia which provides that "All exemptions from taxation heretofore granted in corporate charters are declared to be henceforth null and void" is by its own terms not applicable in this case. It is in terms prospective and not retrospective. The defendant is seeking to tax petitioner for ad valorem taxes on its charter tax lines for the years 1939 to 1945, both inclusive. Said provision of the constitution

does not purport to be retroactive in operation, or to declare any exemption from taxation theretofore granted to be void ab initio, but only to declare them "henceforth null and void." Accordingly, said constitution does not purport to authorize and does not authorize the act threatened by the defendant; nor does the same purport to apply to the provisions of petitioner's charter.

19. In 1874, shortly after passage of the above mentioned act of February 28, 1874, which purported to tax all railroad companies on an ad valorem basis and to repeal the charters of such companies as might conflict with the provisions of said act, the Comptroller General of Georgia issued executions against petitioner for taxes claimed under said act. To these executions petitioner filed an affidavit of illegality in the superior court of Fulton County, as provided in said act, and on the hearing thereof the superior court sustained the affidavit. The judgment of the superior court was affirmed by the Supreme Court of Georgia in the State of Georgia v. Georgia Railroad & Banking Company, 54 Ga. 424. Petitioner then quotes headnotes 1, 2, and 3 of that decision. "Petitioner pleads the judgment in that case as res adjudicata of the issues in this case, and as an estoppel by judgment of said issues, to-wit, that the lines described in this petition as charter tax lines are not subject to ad valorem taxes, but are taxable only on their net income under the special provisions of petitioner's charter; and the judgment being of this honorable court petitioner prays the court to take judicial notice thereof."

20. On January 7, 1904, petitioner filed its bill in equity in the Circuit Court of the United States for the Northern District of Georgia against William A. Wright, in his official capacity as Comptroller General of the State of Georgia, alleging, among other things, that the defendant claimed, first, that petitioner should pay a direct tax on the value of its railroad and equipment in excess of $4,156,000, and second, that petitioner should pay a tax on its franchises, said second claim being made under an act of the legislature approved December 17, 1902, entitled "An Act to provide for and require the payment of taxes on

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franchises, and to prescribe the method for the return and payment of said taxes," and that the Comptroller General "is threatening and is about to proceed to collect said illegal taxes." Petitioner in said bill averred that said purpose and attempt to collect said taxes are illegal and void, because petitioner's charter is a contract between petitioner and the State of Georgia, and by said contract the State bound itself to exact no taxes from petitioner on account of its investments in the charter tax lines of railroad aforesaid exceeding one-half of one per cent of the net earnings of said investments, and said threatened action of said comptroller general and said act of the General Assembly of December 17, 1902, would impair the obligation of said contract, and are unconstitutional under paragraph 1 of article 10 of the amendment to the United States constitution. Petitioner prayed that it be adjudged that it is liable only for a tax to the State not exceeding one-half of one per cent of petitioner's investments in its railroad, and that the defendant comptroller general be enjoined from proceeding to collect any other tax from petitioner. On July 3, 1907, said Circuit Court entered a decree in said case enjoining the comptroller general as prayed. The comptroller general appealed to the Supreme Court of the United States from said decree, and by a decision rendered February 21, 1910, 216 U. S. 420, 54 L. ed. 544, that court affirmed the decree in so far as it related to the property referred to as petitioner's charter tax lines, and reversed it only in so far as it related to petitioner's branch line from Barnett to Washington, Georgia, which petitioner does not now include in its charter tax lines. Excerpts from the decision of the United States Supreme Court are contained in this paragraph of the petition, which paragraph concludes as follows: "Petitioner attaches hereto as exhibit A a copy of the entire record of said case [in the said Circuit Court and in the United States Supreme Court] and pleads the final judgment in said case as res adjudicata of the issues in this case that the lines described in this petition as charter tax lines are not subject 'to ad valorem taxes, but are taxable only on their net income' under the special pro-

visions of petitioner's charter, and petitioner also pleads said judgment as an estoppel upon said issues."

21. By section 78 of the act approved August 28, 1931, (Ga. Laws 1931, pages 7 et seq.), a State Revenue Commission was created consisting of the comptroller general and two commissioners, and by section 4 of the act approved January 3, 1938 (Ga. L. Ex. Sess. 1937-38, pages 77 et seq.), the State Revenue Commissioner was vested with all the power and authority, and was required to perform all the duties, formerly vested in the State Revenue Commission with certain exceptions not here material, and was also vested with all power and authority, and was required to perform all the duties relating to taxation theretofore vested in any State administrative official or State department, so that now all duties with respect to the taxes assessed against petitioner have devolved upon the defendant in this case, who in these respects is the successor in office of the former comptroller general.

22. Petitioner desires to contest the effort of the defendant to assess said property for taxation as hereinbefore set out, but is advised by counsel and, therefore, alleges that there are grave doubts and uncertainties as to the method to be followed in so doing, for the following reasons:

(a) Petitioner is advised defendant is proceeding under the act of 1918, page 232 (Chapter 92-61 of the Code), which provides for assessments against property owners failing to return or grossly undervaluing their property, and which provides, in section 92-6104, that a taxpayer who disputes the taxability of his property may raise the question by petition in equity in the superior court of Fulton County. Chapter 92-61 of the Code may not be applicable in this case because:

(1) Petitioner has not omitted to return its property for taxation for the years 1939-1945 inclusive, and has not undervalued the property which it has returned for those years, and because

(3) The act of 1918, page 232, or, at least, section 92-6104 of the Code, may have been repealed by the act of

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1937-38, Extra Session, page 77, providing in section 44 for review by the Board of Tax Appeals of assessments made by the State Revenue Commission, and said provisions of said act of 1937-38 may, in turn, have been repealed, as to questions involving taxability, by the provisions of the act of 1941, page 200, withdrawing from the Board of Tax Appeals the right to review assessments by the State Revenue Commission except those entered by the commissioner on the tax returns for ad valorem taxation required to be made to him.

(b) Both the act of 1918 and "the applicable provisions" of the act of 1937-38, page 77 (if the same have not been repealed by the act of 1941, page 200), may have been repealed by the act of 1943, page 204, which provides for a review of assessments made by the State Revenue Commissioner by appeal to the superior court of the county in which is located the taxpayer's principal place of doing business or in which the taxpayer's chief or highest corporate officer resident in this State maintains his office, which, in petitioner's case, would be the superior court of Chatham County.

(c) The act of 1943, page 204, provides that nothing therein contained "shall be construed to deprive a taxpayer against whom an execution for taxes has been issued under an assessment by the State Revenue Commissioner of the right to resist enforcement of the same by affidavit of illegality." The act of 1931, page 7 (Code, § 92-7301), gave to a taxpayer the right to test the question whether a tax assessed by the State Revenue Commissioner was legally due, by affidavit of illegality, but petitioner is advised that doubt exists as to whether that act was repealed by the act of 1937-38 Extra Session, page 77, and, therefore, as to whether petitioner would have the right to test the question whether this tax is legally due by affidavit of illegality. If said act of 1931 has been repealed, then there is doubt as to whether petitioner would have the right to test by affidavit of illegality the question whether the taxes involved in this case are legally due, because the only other right given to a taxpayer to file an affidavit of illegality is to be found in Code section 92-3604 (§ 92-

2604f), and it has been held by the Supreme Court that that remedy is only open to taxpayers who have made their returns. While petitioner contends that it has made returns of all its property subject to ad valorem taxation, defendant contends that it has not.

23. For the reasons set forth in the foregoing paragraph, petitioner's remedy to contest its liability for the assessment which defendant proposes to make, by or through any statutory proceeding or proceedings at law, is highly doubtful and uncertain, and petitioner cannot safely risk an adjudication as to the proper remedy by following either the procedure outlined in section 92-6104 of the Code, or the procedure outlined by the act of 1938, as it has been amended, for the reason that, once the assessment is made, the taxpayer must present the appeal under the act of 1938, as amended, within thirty days. Thus if petitioner seeks to contest the taxability of said property by a petition in equity, as authorized by section 92-6104 of the Code, and it should be determined that that section and the procedure there authorized has been repealed or superseded by the act of 1938, it would then be too late to appeal from the assessment. On the other hand, if petitioner should appeal from the assessment within thirty days, and it should thereafter be determined that petitioner's remedy was by following the procedure outlined in section 92-6104 of the Code, with the result that petitioner's appeal would be dismissed, petitioner would then be in danger of its petition in equity being barred on account of laches. "If petitioner should thus be placed in a position in which neither the procedure outlined in Code section 92-6104 nor that outlined in section 92-8426-d and 92-8446 was open to it, it is doubtful, for the reasons hereinbefore stated, whether petitioner could proceed by affidavit of illegality, so that petitioner might be remediless."

24. An actual controversy exists between petitioner and defendant as to the matters and things set forth in this petition. Petitioner contends that its charter tax lines are not subject to ad valorem taxation by the State or any of its political subdivisions and are not subject to any other

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form of taxation save that provided by petitioner's charter, and that this is true despite the act of 1874, and article 1, section 3, paragraph 3 of "the constitution of 1877, as amended August 7, 1945." The defendant contends that under the constitution of 1877 and under said act of 1874 the charter tax lines of petitioner are subject to ad valorem taxation to the same extent as other lines of petitioner upon which it has already paid ad valorem taxes. The defendant further contends that whether or not the charter tax lines were subject to ad valorem taxation under the constitution of 1877, or under said act of 1874, said charter tax lines are subject to such ad valorem taxation under the constitution of 1945, and that said constitution is retrospective and retroactive in operation and subjects said charter tax lines to ad valorem taxation for years antedating the adoption of the constitution of 1945, as well as for future years. Petitioner contends that said constitution of 1887 as amended in 1945 is by its terms prospective only in operation and effect, with the result that it does not purport to subject said charter tax lines to taxation for years antedating the amendment of 1945, and that in so far as it undertakes or seeks to subject them to taxation for future years, it is unconstitutional because violative of article 1, section 10, paragraph 1 of the constitution of the United States, for all of the reasons hereinbefore stated. With respect to the years 1939 to 1945 the controversy between petitioner and defendant is not only actual but acute, in that defendant has stated his purpose to assess taxes against petitioner for all of said years, has threatened to do so and will do so unless enjoined. As to future years, the controversy is actual because the defendant has threatened to and will assess taxes against said charter tax lines for all future years.

25. Defendant is proceeding to assess petitioner's property for ad valorem taxation for the years 1939 through 1945, for State, county, municipal and school taxes and will so assess same unless the rights of the parties are determined before said assessment can be made, and, if they are not determined before said assessment can be made (and it is most unlikely that they can be) defendant will proceed

to issue executions against petitioner for the ad valorem taxes which he claims to be due for each of the seven years involved, and to levy said executions on petitioner's property unless he is enjoined.

26. If defendant is not enjoined as hereinafter prayed, he will proceed to assess petitioner's charter tax lines for ad valorem taxation for the years 1939-1945, inclusive. If petitioner's remedy against said assessment should be held in this proceeding to be under the provisions of the act of 1938 as amended, petitioner's appeal from said assessment must be entered within thirty days, failing which petitioner will be remediless. It is, therefore, necessary that defendant be restrained from assessing said property in order that the present status may be maintained and petitioner's rights preserved.

27. Wherefore, petitioner brings this suit, as authorized by the act of the General Assembly of Georgia of 1945, known as the declaratory judgment act, and shows that it is entitled to have this court determine and declare the rights and liabilities of the parties with respect to the controversy hereinbefore described, and particularly with reference to the taxability of the property referred to in this petition which the defendant proposes to and will assess for taxation as herein alleged, and that it is also entitled to such other and further relief as will eventually preserve and prevent violation and impairment of the contracts herein described.

Waiving discovery, petitioner prays:

(1) That the court will determine, adjudicate, and declare:

(a) That petitioner's charter tax lines hereinbefore described are exempt from ad valorem taxation for the years 1939-1945, both inclusive, and are not otherwise taxable except in the manner and method provided in petitioner's charter.

(b) That the defendant is without authority of law to enter ad valorem assessments against petitioner or said property, and that such assessments, if undertaken to be

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entered, will be void for all of the reasons stated in this petition.

(c) That the judgments entered in the cases heretofore decided by the Supreme Courts of Georgia and of the United States, which are referred to in the foregoing petition, are res adjudicata and constitute a final and conclusive determination forever binding upon the State of Georgia and its public officials as to the taxability of said property.

(d) That the court determine and declare that the defendant and his successors in office and all persons who are or may hereafter be charged with the duty of assessing and collecting taxes within the State of Georgia or any political subdivision thereof, should be perpetually enjoined from assessing said property for such taxation or endeavoring in any manner to collect ad valorem taxes thereon.

2. That, if the decree of this court should be made such that the rights and legal relations of the parties hereto can only be adjudicated in another proceeding now provided by the laws of Georgia, then this court will determine, adjudicate and declare whether the taxability of petitioner's charter tax lines can be determined by petition in equity to the superior court of Fulton County under the provisions of section 92-6104 of the Code, or by appeal from defendant's assessment to the superior court of the county in which is located petitioner's principal place of doing business or in which petitioner's chief or highest corporate officer, resident in this State, maintains an office, "under the provisions of sections 92-8446-d and 8446 of the Code of 1933 [§§ 92-8426.4, 92-8446, Ann. Code Supp.†], and also whether petitioner has the additional right to determine said question by affidavit of illegality."

3. That pending a determination of the questions presented by this petition and the declaration of the rights and liabilities of the parties with respect to the taxability of said property and the remedy to be pursued by the petitioner in contesting an assessment thereof by the defendant, the defendant as State Revenue Commissioner, and his

successors in office, be restrained and enjoined from assessing said property or any of same for ad valorem taxation for the years 1939 to 1945, inclusive, or any future years.

4. That pending a hearing and until further order of court, the defendant be temporarily restrained as prayed for in the foregoing paragraph.

5. For process.

6. For rule nisi as to injunction.

7. For general relief.

Downing Musgrove having succeeded Glenn S. Phillips as State Revenue Commissioner on June 10, 1948, and having moved on June 11, to be substituted as plaintiff in error, he was by order of this court, counsel on both sides consenting, substituted as plaintiff in error for Glenn S. Phillips, and was made "a party to this case in exactly the same capacity as Glenn S. Phillips would have continued to be a party to it had he continued in the office of State Revenue Commissioner of the State of Georgia."

Bell, Justice. The parties will be generally referred to herein as plaintiff and defendant, as they appeared in the trial court.

The third ground of the general demurrer filed by the original defendant, then State Revenue Commissioner, and adopted by his successor, who was substituted as party defendant, asserted that the suit "is in reality an action against the State of Georgia, and the State of Georgia has not consented to be made a party to this action or for the action to proceed against it." The defendant urges the same contention (among others) in this court; having excepted to the judgement overruling all grounds of demurrer to the petition as amended.

In the very nature of the contention stated, it is the first matter for consideration, for if this ground of demurrer was good the judgment should be reversed without any decision upon other questions. In other words, if the suit is in reality an action against the State and the State has not consented to be thus sued, it would be entirely out of place to decide anything as to liability of the state in such proceeding.

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The plaintiff does not claim that the State has in fact consented to be sued in this case, but, as to this phase, it simply contends that the suit is against the defendant as an individual, and is therefore not a suit against the State.

The suit was originally brought against the defendant "in his representative capacity as State Revenue Commissioner of the State of Georgia," but this express denomination was later stricken by amendment. Whether or not, in view of other references to the defendant as an official which remained in the petition after such amendment, it could be said that the petition as amended is *in name* a suit against the defendant solely in his individual capacity, is immaterial, if upon a consideration of the petition as a whole, including the relief which it seeks, it appears that the action is in reality a suit against the State, brought without its consent. "Where a suit is brought against an officer or agency of the State with relation to some matter in which the defendant represents the State in action and liability, and the State, while not a party to the record, is the real party against which relief is sought, so that a judgment for plaintiff, although nominally against the named defendant as an individual or entity distinct from the State, will operate to control the action of the State or subject it to liability, the suit is in effect one against the State." Cannon v. Montgomery, 184 Ga. 588 (1), 591. See also Roberts v. Barwick, 187 Ga. 691 (2); Florida State Hospital for the Insane *v.* Durham Iron Co., 194 Ga. 350; Fleicher *v.* Duncan, 195 Ga. 309 (1). The statement just quoted accords with the generally accepted rule, and we are of the opinion that the present suit is an action against the State within this rule. See in this connection, 29 Am. Jur. 304-310, §§ 92-94.

The plaintiff railroad company was chartered by an act of the legislature in 1833, section 15 of which provided: "The stock of the said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said rail roads or any one of them; and after that, shall be subject to a tax not exceeding one half per cent. per annum on the net proceeds of their investments." Ga. L. 1833, p. 256.

The company alleges that defendant has demanded full and complete returns for the years 1939 through 1945, and will unless enjoined assess against petitioner ad valorem taxes with respect to its charter tax lines; also that "An actual controversy exists between petitioner and the defendant as to the matters and things set forth in this petition." On its part, the plaintiff contends and alleges that the quoted provision of its charter constitutes a contract between it and the State of Georgia exempting it from all ad valorem taxation; and it prays for a declaratory judgment adjudicating that such alleged contract does exist, and that it is irrevocable and inviolable. It also asks that certain previous decisions, State of Georgia *v.* Georgia Railroad & Banking Co., 54 Ga. 423; Georgia Railroad & Banking Co. *v.* Wright, 132 Fed. 912; Wright *v.* Georgia Railroad & Banking Co., 216 U. S. 420 (30 Sup. Ct. 242, 54 L. ed. 544), be established as res judicata in its favor and binding as against the State of Georgia and its officials as to the taxability of its railroad properties described in the petition. It further prays for a perpetual injunction against the defendant and his successors in office restraining them from assessing such properties for ad valorem taxation and from endeavoring in any manner to collect ad valorem taxes thereon. All of this, be it remembered, is based upon the contention that the provision as to exemption is a contract between plaintiff and the State of Georgia, valid and binding in perpetuity, so that the plaintiff is thus seeking a decree that would control the action and liability of the State and its officers forever, with respect to such matter.

The plaintiff alleges that the defendant claims to be proceeding under an act of the General Assembly passed in 1874 (Ga. L. 1874, p. 107) entitled "An act to amend the tax laws of this State, so far as the same relate to railroad companies, and to define the liability of such companies to taxation, and to repeal so much of the charters of such companies, respectively, as may conflict with the provisions of this Act," and under article 1, section 3, paragraph 3 of the constitution of 1945, declaring that "All exemptions from taxation heretofore granted in corporate charters are declared to be henceforth null and void." The peti-

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tion then attacks such statute as being unconstitutional and void under the contract clause of the State and Federal Constitutions, and also assails the quoted provision of the Constitution of 1945 as being in violation of such contract clause as contained in the Federal constitution. Wherefore, it is insisted by the plaintiff that the defendant is acting wholly without lawful authority, and that hence he is sued, and is properly sued, as an individual. It is thus contended that the suit is one against the defendant in his individual capacity and is not an action against the State.

It is a well recognized general rule that a suit to restrain a State official from executing an unconstitutional statute in violation of the plaintiff's rights and to his irreparable damage is not a suit against the State, for in such a case the officer is stripped of his official or representative character and is subject in his person to the consequences of his individual conduct. See, in this connection, Dennison Manufacturing Co. *v.* Wright, 156 Ga. 789; Ex Parte Young, 209 U. S. 123, 160; Greene *v.* L. & N. R. Co., 244 U. S. 499, 61 L. ed. 1285; Sterling *v.* Constantin, 287 U. S. 378, 77 L. ed. 375.

Seemingly, the same principle would apply where the officer claims to act under a provision of the State constitution, provided such provision is void as being in violation of the United States constitution, and is duly challenged. It has no application in the instant case, however, for, as shown above, the plaintiff is here seeking to enforce what it claims to be a contract with the State of Georgia, and the State therefore, as a corporate entity, has a distinct and direct interest in the subject matter of the litigation, as distinguished from its mere governmental interest in the enforcement of its laws for the general welfare.

In Hampton *v.* Board of Education of Florida, 90 Fla. 88, 105 Sou. 323, 42 A. L. R. 1456, it was said:

"The rule which forbids a suit against State officers because in effect a suit against the State applies only where the interest of the State is through some contract or property right, and it is not enough that the State should have a mere interest in the vindication of its laws, or in their enforcement as affecting the public at large or the rights

of individuals or corporations; it must be an interest of value in a material sense to the State as a distinct entity. Thus a suit against the Governor of a State, not by name, but solely in his official character, is a suit against the State; so also is a suit against State officers for the purpose of enforcing through them the performance of the contracts of the State, or to compel them to do acts which would impose contractual liabilities upon the State." See also the following decisions of the United States Supreme Court, where alleged contracts of States were involved. In re Ayers, 123 U. S. 443; Hans *v.* Louisiana, 134 U. S. 1; North Carolina *v.* Temple, 134 U. S. 22; Gunter *v.* Atlantic Coast Line Railroad Co., 200 U. S. 273, 285. The last mentioned case involved a claimed charter tax exemption. See also in this connection, Roberts *v.* Barwick, 187 Ga. 691, supra; Florida State Hospital *v.* Durham Iron Co., 194 Ga. 350, supra; 49 Am. Jur. 308, § 94; 59 C. J. 307, § 464. We are unable to see how the plaintiff railroad company could have an actual controversy with the defendant in his individual capacity with reference to the matters set forth in the instant petition.

Section 6 of the Declaratory Judgment Act provides: "No declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding involving the validity of a municipal ordinance or franchise, such municipality shall be made a party and shall be entitled to be heard as a party. If a statute of the State, or any order or regulation of any administrative body of the State, or any franchise granted by the State is alleged to be unconstitutional, the Attorney General of the State shall be served with a copy of the proceeding and shall be entitled to be heard." Ga. L. 1945, 137-8, Code, Ann. Supp., § 110-1106. In the instant case the court ordered that the Attorney General be served with a copy of the suit. The provision referred to, however, does not amount to consent of the State to be sued under such statute; nor has the plaintiff so contended. Compare Roberts *v.* Barwick, 187 Ga. 691, supra.

In view of what has been said, we conclude that the present suit is in substance and effect an action against the State and that it is not maintainable, the State not having

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consented to be thus sued. In the following cases the question here under consideration does not appear to have been raised by counsel or considered by the Court. Georgia Railroad and Banking Co. *v.* Wright, 132 Fed. 912; Wright *v.* Georgia Railroad & Banking Co., 216 U. S. 420. These cases are therefore to be considered only as physical precedents, with little, if any, persuasive force, as to such question. There may be still other cases that would be subject to the same observation.

We do not overlook the plaintiff's allegations to the effect that there are grave doubts and uncertainties as to what remedy it may pursue in contesting the effort of the defendant to assess its charter lines for ad valorem taxation. The petition referred to several statutes of this State relating to remedy, including injunction and affidavit of illegality, to wit: Ga. L., 1918, p. 232; Ga. L. Ex. Sess., 1937-38, p. 77; Ga. L. 1941, p. 200; Ga. L., 1943, p. 204, and prayed for a declaratory judgment as to remedy. The petition was not aided by such allegations and prayer with respect to remedies; for if, as we have held, the suit is in essence one against the State, no judgment should be rendered declaring what remedy or remedies would be available as against it, if any, as that would be a decision at least in part against the State, even though it has not consented to be sued, and is not even a party.

In Beers *v.* Arkansas, 61 U. S. 527, 529 (15 L. ed. 564), it was said: "It is an established principle of jurisprudence in all civilized nations that the sovereign can not be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or another State. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it." See also in this connection, Great Northern Life Insurance Co. *v.* Read, 322 U. S. 47, 88 L. ed. 1121; Ford Motor Co. *v.* Department of Treasury of Indiana, 323 U. S. 459, 89 L. ed. 389; Goldsmith *v.* The Augusta & Savannah Railroad

Co., 62 Ga. 468, 472; Goldsmith *v.* The Georgia Railroad Co., 62 Ga. 485, 494.

Nothing said in this opinion is intended as an expression or intimation upon any question relating to the merits of the plaintiff's contention as to exemption from ad valorem taxation, or upon any question as to what remedy, if any, the plaintiff might have if any of its money or property should be seized or levied upon for such taxes; the defendant having now done nothing more than threaten to make assessments,—according to the allegations of the petition.

It follows from what has been said that the court erred in overruling ground 3 of the general demurrer to the petition. The judgment overruling the demurrer on all grounds, whether general or special, should be vacated, and ground 3 of the general demurrer should be sustained and the petition dismissed, without any ruling or judgment as to other grounds, and without prejudice to either party or the State with respect thereto. And direction is given accordingly.

Judgment reversed, with direction. All the Justices concur except Wyatt, J., absent on account of illness, and Head, J., disqualified.

APPENDIX VII

The following is the judgment rendered by the Supreme Court of the State of Georgia on June 11, 1948, in the case of *Downing Musgrove* v. *Georgia Rail Road & Banking Company*, said judgment not having been handed down, published or otherwise made known until June 15, 1948:

> "This case came before this court upon a writ of error from the superior court of Fulton county; and, after argument had, it is considered and adjudged that the judgment of the court below be reversed because the Court erred in overruling ground 3 of the general demurrer to the petition. Direction is given that the judgment overruling the demurrer on all grounds, whether general or special, be vacated, and that ground 3 of the general demurrer be sustained and the peti-

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tion be dismissed, without any ruling or judgment as to other grounds and without prejudice to either party or to the State with respect thereto. All the Justices concur except Wyatt, J., absent on account of illness, and Head, J., disqualified. Bill of Costs, $15."

The following is a copy of the order of the Supreme Court of the State of Georgia, passed July 16, 1948, overruling appellant's motion to rehear filed June 23, 1948, and its supplemental motion to rehear filed July 13, 1948:

"Upon consideration of the motion for a rehearing and the supplement thereto, filed in this case it is ordered that it be hereby denied. Head, J., disqualified."

The following is a copy of the order of the Supreme Court of the State of Georgia, passed July 28, 1948, overruling appellant's second motion to rehear filed July 21, 1948:

"Upon consideration of the second motion for a rehearing filed in this case, it is ordered that it be hereby denied. Head, J., disqualified."

Filed in office October 13, 1948, K. C. Bleckley, C. S. C. Ga.